

8 Official Opinions of the Compliance Board 1 (2012)

- ◆ Closed Session Procedure
 - ◇ Voting – practices permitted, no violation of requirement that vote be held in open session
 - ◇ Written Statement – practices in violation
 - ◆ Minutes
 - ◇ Generally
 - not to be treated as Public Information Act request
 - ◇ Closed Session Statement – Generally
 - must describe items considered in enough detail to convey the issue discussed
 - must include the three items specified by the Act
 - ◆ Compliance Board
 - ◇ Authority and Procedures – request for penalty, not within Board’s authority
 - ◆ Meeting
 - ◇ Generally – posting of agenda in advance, not required by Act
 - ◆ Exceptions Permitting Closed Session
 - ◇ Legal Advice of counsel – exception applies when counsel is also member of staff so long as legal advice was given
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January 4, 2012

Re: Anne Arundel County Ethics Commission (Stephen Donnelly, Complainant)

We have considered the allegations of Stephen Donnelly (“Complainant”) that the Anne Arundel County Ethics Commission (the “Commission”) violated the Open Meetings Act (“the Act”) and other laws with respect to a meeting on October 10, 2011. The Commission denies those allegations.

We discuss the allegations and set forth our conclusions below.

I

Discussion

1. *The alleged closed-session discussion of, and vote on, a member's motion to close a publicly-announced meeting*

Complainant alleges that the Commission published notice of its October 10 meeting, that he came to the meeting room to attend the meeting, that he was asked to leave the room before the meeting started, and that the minutes "should reflect" that the Commission at that time was holding a closed meeting during which a member moved to close the public meeting and the members voted to deny the motion. Complainant was not in the room. The Commission, in a submission signed by each Commissioner and the Executive Director, denies these allegations. It states that no meeting occurred before Complainant's arrival, that he was asked to wait in the front room when he arrived, and that he was invited into the meeting room as the meeting was called to order. It has also confirmed that no motion was made and no public business was discussed before Complainant was admitted to the room. A motion to close the public meeting was made later, during the public meeting and in Complainant's presence.

The Act requires a public body to vote in public on a motion to close a meeting. State Government Article ("SG") §10-508(d). We find that the Commission did not violate this requirement.

2. *The allegations pertaining to Complainant's in-person request for "the meeting minutes file" and the Commission's production of minutes in conjunction with its response to Complainant's request for opinion files*

Complainant alleges that he appeared at the Commission's office to request the minutes of Commission meetings, that his request was denied, and that the Commission never has produced its "Public Meetings Minutes File." The Commission responds that Complainant asked for minutes for every meeting held over the last six years as well as opinion files signed by the Executive Director; that it does not keep a separate file of meeting minutes; that Complainant's request required a search through the files for each meeting in question; that Complainant was "confrontational, rude, and accusatory"; and that the office was staffed at that time only by the Executive Director because her co-worker was taking a lunch break. The Commission further states that the Executive Director "was extremely uncomfortable with the situation," did not wish to either leave the documents on her desk unattended or suspend work on the "time-sensitive" task in which she was engaged, and was not comfortable communicating with Complainant orally. The Executive Director

instead asked Complainant to submit a written request for all the documents he wanted. On October 11, 2011, three business days after Complainant e-mailed his request¹ and one day after seeking legal advice from the Executive Director on the confidentiality of the opinion files, the Commission responded to Complainant's requests by informing him that it would treat his e-mail request as a Public Information Act ("PIA") request and that he could inspect the minutes and certain other documents by appointment at the office or request copies at a fee.

It appears that Complainant now has the minutes. He complains that he does not have "outtakes" and notes and that the Commission has violated the Act by not maintaining a file dedicated to minutes.

The Act only requires the Commission to produce minutes and closing statements and thus does not apply to a person's request for meeting notes and transcripts. Further, the Act does not regulate the manner in which a public body files its minutes, so long as the public body retains them for one year.

The Act does require a public body to make the minutes themselves "open to public inspection during ordinary business hours." SG §10-509(d). Under a literal reading of the Act, then, the Commission should have permitted Complainant to inspect minutes and then required a written request only for the other documents. The submissions in this matter, however, suggest that a small public body, unequipped at a particular time to respond immediately to a request for years' worth of minutes coupled with a request for other documents, should not invariably be faulted for failing to do so. Here, much depends on the Executive Director's perception of the circumstances. We are not a fact-finding body. We therefore do not reach any conclusion on the Complainant's demeanor, the reasonableness of the Executive Director's discomfort and concern for the security of the documents on her desk, or the ability of the Commission to comply promptly with SG §10-509(d). It may be that these parties could have accommodated each other's needs by, on the part of the Complainant, tailoring his request to the minutes quickly available and briefly leaving the office while the Executive Director went to the file room, and, on the part of the Commission, inviting the Complainant to return to inspect those minutes later that day. The facts of this particular case do not enable us to reach a conclusion, one way or the other, on whether the Commission could have achieved substantial compliance with SG §10-509(d) in such a way.

¹ Columbus Day intervened.

Nonetheless, a public body may not treat a request to inspect minutes at the public body's office as a PIA request, subject to the PIA procedures for requesting documents. A public body thus may not require a person to submit a written request for the minutes of its open meetings. In this particular matter, where the Complainant was also requesting documents subject to PIA procedures rather than Act procedures, and the Commission in fact produced the minutes and responded to the PIA request within days of receiving it, the Commission's procedural violation does not appear to have substantially interfered with the Act's broad goal of transparency.²

When a public body has a limited ability to maintain regular business hours during which minutes may be inspected, we commend the practice of making minutes available on the public body's website. *See, e.g., 6 OMCB Opinions 164, 168 (2009).*

3. *The allegations pertaining to the Commission's response to Complainant's PIA request and the role of the Commission's executive director; the requests for certain Commission documents, considerations of fines, and referrals of matters to other agencies*

The Complainant asserts wide-ranging allegations concerning the Commission's activities. We lack the authority to address allegations and requests that do not raise an issue under the Act. *See* SG §2-502.5 (stating the Board's authority to address the application of the Act to the actions of a public body). We also lack the authority to impose a civil penalty. *See* SG §2-502.5(d).

With regard to Complainant's request that we "obtain" minutes for 2009, 2010, and part of 2011, we note that Complainant has commendably provided us with the minutes we need - those of the meeting that is the subject of this complaint. The Commission invited him to inspect the other minutes before he filed this complaint – but when he appeared, according to him, the Commission charged him for copies and did not permit him to inspect the original minutes.

As a general matter, the Act entitles a citizen to inspect minutes and closing statements at no charge, SG §10-509(d), but not to receive free copies, and not to receive copies of other documents. The Act's complaint procedures

² The parties have not provided us with Complainant's e-mail request for documents. We therefore do not address the possibility that the Commission may have believed from the fact that he submitted the e-mail that he had acquiesced, or, until the October 10 meeting, not objected, to the Commission's instruction that he request the minutes in writing, along with his request for the other documents.

do not confer greater rights, and the Act does not contemplate that they be used as a substitute for a PIA request. By the same token, a public body may not substitute PIA procedures for its obligations under the Act, and, as we explained in Section 2, the Commission did so.

4. The Commission's practices with respect to the posting of an agenda before each meeting

Complainant states that the Commission's "pre-printed stock agenda" is uninformative. He cites, as an example, the lack of an entry under the heading, "New Business." The Act does not require a public body to issue an agenda in advance, *see 6 OMCB Opinions* 196, 198 (2009), and we therefore find no violation of the Act in this regard.

5. Allegations that the minutes lacked sufficient detail

The Commission invited Complainant to comment at the October 10 meeting. According to him, he commented that the Commission had not complied with its obligation under the Act to enable him to inspect minutes, asked when it would comply with his written request for those and other documents, and was told "In due course." According to the Commission, he discussed many subjects and "appeared to be reading from several papers ...[which] may have been any one of several documents he had previously faxed to the commission." One such request, the Commission states, was his "previous request to examine certain commission files, ...pending as a PIA request." In any event, the minutes only reflect that Complainant "made comments."

We have explained that minutes must described "each item considered ... in sufficient detail so that a member of the public who reviews the minutes can [gain] an appreciation of the issue under discussion." *6 OMCB Opinions* 164, 168 (2009). The Commission states that "[n]othing that [Complainant] said required consideration or action from the commission." Nonetheless, the Commission then voted to close the meeting to discuss Complainant's request for documents. We conclude that the minutes should have reflected that Complainant discussed his request for documents.

6. Allegations that the Commission improperly closed its meeting to receive advice of counsel on Complainant's request for documents and that the closing statement lacked sufficient detail

Complainant states that the Commission improperly closed its meeting to obtain legal advice - an event for which a public body may close a meeting under SG §10-508(a)(7) - because, in this event, the counsel also serves as

Executive Director, and, for some purposes, the law governing the Commission does not permit the Executive Director to serve as counsel to the Commission. The statute on which Complainant relies disqualifies the executive director from serving as counsel at a hearing on a complaint or matters related to the complaint. Complainant's PIA request was not a complaint. We conclude that the Commission properly closed the meeting to receive legal advice and that the Executive Director's dual role did not change the nature of the topic. We also conclude that the Commission adequately summarized its discussion of this topic in its summary of the closed session.³

The closed session summary raises the question of whether the scope of the discussion exceeded the scope of the exception. We have explained that while a body may receive legal advice in a closed session, its action on that advice, if on a matter not covered by an exception, does not fall under SG §10-508(a)(7). *See, e.g., 6 OMCB Opinions* 127, 130-31 (2009). If the Commission merely applied existing law to administer its duties under the PIA, the discussion was likely administrative in nature and permissibly conducted in a closed session. *See 5 OMCB Opinions* 33, 39 (2006) (discussing public body's administration of Act procedures).

Complainant also states that the closing statement lacked the detail required by the Act. We agree. We direct the Commission to the guidelines we set forth recently in *7 OMCB Opinions* 225, 227-29 (2011), available at <http://www.oag.state.md.us/Opinions/Open2010/7omcb225.pdf>, and to the form closing statement attached as Appendix C to the Attorney General's Open Meetings Act Manual, available at <http://www.oag.state.md.us/Opengov/Openmeetings/support.htm>. The one-page closing statement attached to the Commission's response cites the exception relied upon for the closing, as required by SG §10-508(d), but does not state the "reason for closing the meeting" and "includ[e] ... a listing of the topics to be discussed."

II

Conclusion

To the extent that the Commission treated Complainant's request for meeting minutes as part of his request for documents under the Public Information Act, it violated the Act's procedures for producing minutes. As a substantive matter, we note that the Commission has made the minutes

³ The summary states: "The commission unanimously voted not to waive the confidentiality of certain records. The commission members reviewed and approved a draft letter in response to a PIA request."

available to Complainant. Additionally, we encourage the Commission to include more detail in its minutes and closing statements.

OPEN MEETINGS COMPLIANCE BOARD

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